SUPREME COURT, U. S.

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Supreme Court of the United States

October Term 1966

No. 993

CHARLES TANNENBAUM,

Appellant,

against

STATE OF NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
The Opinion Below	1
Jurisdiction	2
Questions Presented	3
Statute Involved	3
Statement	4
How Federal Issue Raised	5
THE QUESTIONS ARE SUBSTANTIAL:	
1. Section 484-i is unconstitutional because of its vagueness and restriction on freedom of expression	6
2. The statute is unconstitutional because it contains no requirement on the subject of scienter as to the age of the purchaser	10
3. The constitutional standards with respect to scienter were not established	11
APPENDIX:	
New York Penal Law	13
Opinion of Court of Appeals	18
Order and Judgment of Affirmance	34

Table of Cases Cited

	PAGE
A Woman of Pleasure v. Massachusetts, 383 U. S. 413	2
Baggett v. Bullitt, 377 U. S. 360	6, 7
Burstyn v. Wilson, 343 U. S. 495	6
Cramp v. Board of Public Instruction, 368 U. S. 278	6
Gelling v. Texas, 343 U. S. 960	6
Lanzetta v. New Jersey, 306 U. S. 451	6
Matter of Commercial Pictures v. Board of Regents, 346 U. S. 587	6
People v. Bookcase, Inc., 14 N. Y. 2d 408	5, 10
People v. Fritch, 13 N. Y. 2d 119	11
People v. Kahan, 15 N. Y. 2d 311	5, 8, 10
People v. Kaplan, 44 Misc. 2d 110	8
Smith v. California, 361 U. S. 147	2, 10, 11
Winters v. New York, 333 U. S. 507	2, 6

Statutes Cited

Fourteenth Amendment of the United States Constitution	3
Penal Law § 484-i	1, 2, 3, 4, 6
28 U. S. C. 1257(2)	2

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of the State of New York entered September 29, 1966 which affirmed his conviction by the Criminal Court of the City of New York for violation of Penal Law § 484-i, and submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

The Opinion Below

The opinion of the Court of Appeals of the State of New York is reported at 18 N. Y. 2d 268. It is set forth in full in the appendix hereto, *infra*, pp. 18-33.

Jurisdiction

Appellant was convicted of the crime of selling a magazine, to wit, CANDID, Vol. 8, No. 1, to a person under the age of 18 years in violation of Penal Law § 484-i. He was sentenced to a fine in the sum of $100 or 30 days in the workhouse and, in addition, was given a sentence of 30 days in the workhouse, which latter sentence was suspended. The fine was paid and appellant is not now in custody or at large on bail.

The conviction was had in the Criminal Court of the City of New York, for the County of New York, before a court of three judges, without a jury (R. 47, 49).* It was sustained on appeal to the Appellate Term of the Supreme Court of the State of New York for the First Department (R. 59, 60). Leave was given to appeal to the Court of Appeals (R. 57). That Court upheld the conviction on September 29, 1966 (*infra*, pp. 34, 35). The notice of appeal was filed in the Criminal Court of the City of New York for the County of New York, the court possessed of the record herein, on December 23, 1966.

The statutory provision which confers jurisdiction of the appeal upon this Court in 28 U.S.C. 1257(2). The following cases sustain the jurisdiction of this Court to review the conviction of appellant by appeal:

Winters v. *New York*, 333 U.S. 507;
Smith v. *California*, 361 U.S. 147;
A Woman of Pleasure v. *Massachusetts*, 383 U.S. 413.

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* The references are to the certified copy of the printed record in the New York Court of Appeals.

Questions Presented

(a) Does Penal Law § 484-i violate appellant's right to due process under the Fourteenth Amendment to the United States Constitution on the ground that said statute is too vague and unduly restricts freedom of speech and of the press?

(b) Does Penal Law § 484-i, as applied to persons under the age of eighteen, unduly abridge freedom of speech and of the press in violation of the due process clause of the Fourteenth Amendment?

(c) Does Penal Law § 484-i deprive appellant of his right to due process under the Fourteenth Amendment to the United States Constitution on the ground that it contains no provision requiring scienter with respect to the age of the purchaser?

(d) Was appellant's right to due process under the Fourteenth Amendment to the United States Constitution violated because of the absence of proof in the record with respect to his knowledge that the material sold came within Penal Law § 484-i?

(e) Was appellant's right to due process under the Fourteenth Amendment to the United States Constitution violated because of the absence of proof in the record with respect to his knowledge of the age of the purchaser?

Statute Involved

Penal Law § 484-i is set forth in full in the appendix, *infra*, pp. 15-17.

Statement

Appellant was originally charged with the sale of two magazines, FIGURE and CANDID, to a person under the age of 18 in violation of Penal Law § 484-i (R. 5-7), but in a superseding information the first of the two magazines was omitted (R. 8, 9). This new information contains three counts.

The first count recites that the magazines contained photographs which, in the language of the statute, were "posed and presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen and to their curiosity as to sex and to the anatomical differences between the sexes" and which depicted naked genitals, pubic areas, buttocks and female breasts. This is apparently based on subdivision 1(a) of the statute.

The second count again quotes the statutory language but claims that the pictures were presented so "that the viewer's attention and concentration is primarily focused" on the various naked positions of the body referred to in the first count. This is apparently based on subdivision 2 of the statute.

The third count deals with the written material rather than the pictures and charges that it contained descriptions of aroused genitals, acts of intercourse and perversion, again using the statutory language above quoted. This is based on subdivision 3 of the statute.

Although the testimony of the People's so-called expert witnesses was entirely confined to the pictures in the magazine (R. 29, 31, 33), the court convicted appellant on all three counts (R. 49).

The People proved the purchase of two so-called "girlie" magazines, CANDID and FIGURE, by a young man (R. 16-19). That he was under 18 at the time was conceded (R. 12). On cross-examination it appeared that the young man had

never looked inside the magazine Candid* (R. 20) and had gone to the store on Vesey Street for the first time on that occasion, having volunteered to act for Operation Yorkville (R. 20, 21).

The People also paraded a large number of witnesses—clergymen and physicians—the first of whom testified that the pictures in CANDID "would incite an individual under the age of eighteen to lustful thoughts and indecent interest" (R. 29). It was stipulated that each of the others would express the same opinion (R. 31, 33, 35, 36, 37, 38, 39, 40). All this testimony had been objected to as irrelevant (R. 27-29) and at the end of it appellant's counsel moved to strike it (R. 41).

How Federal Issue Raised

At the outset of the trial appellant's counsel moved to dismiss on the ground that the statute violated due process as guaranteed by the Fourteenth Amendment because it was too vague and violated freedom of expression, pointing out that an earlier statute [§ 484-h] had been so held both as to books, *People* v. *Bookcase, Inc.*, 14 N.Y. 2d 408, and as to magazines, *People* v. *Kahan*, 15 N.Y. 2d 311 (R. 12, 13). That motion was renewed at the end of the People's case (R. 42) and at the end of the entire case (R. 45). In addition, counsel moved to dismiss on the ground that the statute violated due process because it contained no provision with regard to scienter of the age of the purchaser and on the ground that the proof did not conform to constitutional standards in that respect and also that the proof did not conform to constitutional standards with respect to knowledge of the character of the material (R. 42, 43, 45).

These contentions were again raised in the appeals to the Appellate Term and the Court of Appeals and two of them were expressly passed upon by the Court of Appeals.

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* The superseding information referred only to CANDID (R. 9).

THE QUESTIONS ARE SUBSTANTIAL

1. Section 484-i is unconstitutional because of its vagueness and restriction on freedom of expression.

This Court has consistently struck down statutes on the score of vagueness. Thus, it has condemned the use of various words and phrases on that score:

> "gang"—*Lanzetta* v. *New Jersey*, 306 U.S. 451;
>
> stories "so massed" as to incite—*Winters* v. *New York*, 333 U.S. 507;
>
> "sacrilegious"—*Burstyn* v. *Wilson*, 343 U.S. 495;
>
> "prejudicial to the interests of the community"—*Gelling* v. *Texas*, 343 U.S. 960;
>
> "immoral;" "would tend to corrupt morals"—*Matter of Commercial Pictures* v. *Board of Regents*, 346 U.S. 587;
>
> "aid, support, advice, counsel or influence" to the Communist Party—*Cramp* v. *Board of Public Instruction*, 368 U.S. 278;
>
> "advises, teaches, abets or advocates" assistance to the Communist Party—*Baggett* v. *Bullitt*, 377 U.S. 360.

The rules outlined in these cases of course apply with particular force to situations in which First Amendment rights are involved. As Mr. Justice White said in the *Baggett* case, at page 372:

> "As in *Cramp* v. *Board of Public Instruction*, '[t]he vice of unconstitutional vagueness if further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.' 368 U.S. 278, 287. We are dealing with indefinite statutes whose terms, even narrowly construed, abut

> upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker—teachers and public servants—to 'steer far wider of the unlawful zone,' *Speiser* v. *Randall*, 357 U.S. 513, 526, than if the boundaries of the forbidden areas were clearly marked. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited. *Smith* v. *California*, 361 U.S. 147; *Stromberg* v. *California*, 283 U. S. 359, 369. See also *Herndon* v. *Lowry*, 301 U.S. 252; *Thornhill* v. *Alabama*, 310 U.S. 88; and *Winters* v. *New York*, 333 U.S. 507."

To paraphrase this view as it might be applied here, no printed matter could be sold to persons under the age of 18 that was not perfectly safe and for that matter might not be sold to adults because of the fear that by chance a person under 18 would become a purchaser. The restriction on freedom of expression resulting would violate the First Amendment guarantees as incorporated into the due process clause of the Fourteenth Amendment.

For here the governing words in the statute are the following: that the material be

> "* * * presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes * * *."

We submit that within the above decisions of this Court such a standard is too vague, even though the law is limited to exposed genitals, buttocks, female breasts, or acts of sexual conduct or of perversion.

Judge Keating in his opinion in the Court of Appeals really made no attempt to point out in what way the

statute now under consideration differed from old § 484-h which his Court had the year before held to be unconstitutionally vague (*People* v. *Kahan, supra*). Both of these statutes set forth as standards that the "material must be posed or presented in such a manner as to exploit lust for commercial gain." This, of course, was clearly indicated in the dissenting opinion here (*infra*, p. 27). Therefore, the majority opinion merely contains the fiat that the statute "clearly excludes legitimate works of art, educational texts and literature with redeeming social value" (*infra*, p. 21). It is difficult to see what there is in the statute which justifies such a conclusion. The provision to which Judge Keating refers in the paragraph containing this last dictum merely refers to medical or biological text books. It by no means excludes works of art or written material other than these two items. It should be borne in mind that what is involved here is not whether a particular magazine can be declared in violation of a properly worded statute, but whether the statute is not so broad as to embrace within its net many things the sale of which, even to minors, cannot properly be prohibited.

In this connection it is interesting to observe that Judge Bloom of the Criminal Court of the City of New York, in dealing with the predecessor statute, said in *People* v. *Kaplan*, 44 Misc. 2d 110, at page 113:

> "The statute proscribes 'pictures of nude or partially de-nuded figures, posed or presented in a manner to provoke or arouse lust or passion'. It would apply equally to Rembrandt's 'Bathsheba', to Titian's 'Venus and the Lute Player' and 'Venus with a Mirror', to Veronese's 'Mars and Venus' and 'United by Love', to Rubens' 'Venus and Adonis', and to Dell'Abate's 'The Rape of Prosperine' and to Thomas Hat Benton's 'Persephone' as to the tawdry photographs in the publications in question. * * *"

Judge Bloom's list could, of course, be expanded indefinitely. Indeed, the distinguished historian of art, Kenneth Clark, in his "The Nude" (Doubleday Anchor, 1959), suggests (p. 29) that all portrayal of the nude arouses erotic feeling. And that is apparent in many of the illustrations in the book. (See, e.g., No. 107 at p. 204; No. 266 at p. 421; No. 277 at p. 444.)

We submit, moreover, that the statute imposes unconstitutional restrictions on freedom of expression even though some clear meaning could be given to these words. We do not believe there is constitutional basis for denying persons under 18 the right to obtain material merely because it could arouse their lustful thoughts or their "curiosity as to sex or to the anatomical differences between the sexes." Certainly the language last quoted cannot possibly form the basis for any valid prohibition. Every growing person properly has curiosity with respect to such matters. And to make the satisfaction of such curiosity criminal is an arbitrary legislative fiat which violates all concepts of freedom.

It is interesting in this connection to note that the so-called experts who testified for the People did not claim that the material contained in the magazine would result in any improper actions. All that was suggested was that it would incite to "lustful thoughts and indecent interest" (R. 29). We submit that the state has no right to prohibit thoughts or interest or the distribution of material which might produce such thoughts or interest, even though restricted to persons under 18. Nothing which has heretofore been said by this Court with respect to the propriety of statutes restricting sales to minors supports the particular statute here under consideration.

We submit, therefore, that a substantial question is here presented with respect to the constitutionality of the section on the score of vagueness and restriction on freedom of expression.

2. The statute is unconstitutional because it contains no requirement on the subject of scienter as to the age of the purchaser.

Notwithstanding the comment by Judge Van Voorhis of the New York Court of Appeals in the *Bookcase* case, *supra* (at p. 418), and the comments of three judges of the Court of Appeals in the *Kahan* case, *supra* (at p. 312), the statute under consideration contains no provision whatever with respect to knowledge concerning the age of the purchaser.

Judge Keating recognized that this was a constitutional question which had never been directly ruled on. In effect he said that the rule with respect to knowledge of the character of the material enunciated in *Smith* v. *California*, 361 U.S. 147, should not apply to knowledge of age because the seller could "easily perceive the difference between an infant and an adult" (*infra*, p. 24), and indicated that if there was doubt there should be inquiry. Thus, under this statute as construed the vendor could be punished even though he had every reason to suppose that the purchaser was over the proscribed age. In this respect it may be pertinent to point out, as the dissenting judges did (*infra*, p. 29), that the New York legislature enacted a new § 484-h in which there is a provision requiring knowledge of the age of the minor with certain qualifications. The full text of that provision is also contained in the appendix (*infra*, pp. 13-15).

Judge Fuld, in his dissent concurred in by Judges Van Voorhis and Bergan, said (*infra*, p. 30):

> "* * * This rationale [of the *Smith* case, *supra*] would seem to be equally applicable to *scienter* as

> to age when the youth of the buyer is an element of the crime. Absolute liability without regard to whether the bookseller was put on notice that his customer was under age would necessarily restrict and curtail the distribution of literature to adults, particularly women, whose youthful appearance belied mature years. In its efforts to protect children, the State is not privileged to so hinder the flow of information and ideas."

There can be no doubt that this presents a substantial question.

3. The constitutional standards with respect to scienter were not established.

We submit that with respect to neither knowledge of the character of the material nor knowledge of the age of the purchaser were the requirements of *Smith* v. *California, supra,* met. All the People proved was the fact of the sale.

The question is here presented whether or not the principle announced by this Court in *Smith* requires proof not only that the seller knew what was in the material but that he had reason to believe it violated the statute. This view was, in effect, accepted some years ago by the New York Court of Appeals when it ordered a new trial in the "Tropic of Cancer" case (*People* v. *Fritch,* 13 N.Y. 2d 119) so as to give the state an opportunity to prove scienter. For the character of that book was, by that time, so notorious that the only purpose of a new trial could possibly have been to establish that the seller had reason to believe the book was obscene.

(a) There was no testimony of any conversation from which it could be inferred beyond a reasonable doubt that the vendor knew that what had been purchased in any way violated the statute. The only inference of scienter as to the character of the material permissible from this record is that appellant looked at the cover of the magazine

CANDID to find out its price (R. 18, 19). But the picture on the cover does not come within the prohibition of the statute—breasts and private parts are covered and no buttocks are visible. And with particular reference to the third count, it is clear there is absolutely nothing to justify an inference that appellant had ever known what the printed material in the magazine consisted of or that it violated the statute.

(b) There certainly was no testimony from which an inference could be drawn beyond a reasonable doubt that the vendor should have known the purchaser was under 18 years of age since the record is barren of any description of the purchaser.

While these points were not discussed in either of the opinions in the Court of Appeals, they were raised at the trial (R. 42, 25) and in appellant's brief in the Court of Appeals under the heading "In any event the convictions cannot be sustained without violating the State and Federal Constitutions because of the absence of proof as to scienter."

It is respectfully submitted, therefore, that substantial federal questions are presented and the Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX

New York Penal Law

§ 484-h. **Exposing minors to harmful materials**

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor.

§ 484-i. **Sale or delivery of pornographic material to minors under the age of eighteen**

Any person who knowingly sells, lends or gives away to a person actually or apparently under the age of eighteen years:

1. any photograph, drawing or similar representation, whether singly or in sets or contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes and which shows, depicts or reveals such person or persons:

(a) with less than a fully opaque covering of his or her genitals, pubic areas or buttocks, and, if that person is a female, with less than a fully opaque covering of any portion of the breast below a point immediately above the top of the areola, or

(b) with his or her genitals in a state or condition of sexual stimulation or arousal, or

(c) engaged in an act of acts of masturbation, homosexuality, or sexual intercourse, or in physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, or

2. any collection, series or combination of photographs, drawings or similar representations, whether or not contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and depicted or shown in such a posture or way that the viewer's attention or concentration is primarily focused on that person's or those persons' genitals, pubic areas, buttock or buttocks, female breast or breasts, and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes, or

3. any book, "pocket book", pamphlet or magazine, phonograph record, tape or similar electronic reproduction of sound, containing details, descriptions, or narrative accounts of:

(a) the genitals in a state or condition of sexual stimulation or arousal, or

(b) acts of masturbation, or

(c) acts of homosexuality, or

(d) acts of sexual intercourse, or

(e) acts of physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, which contact is made in an act of sexual stimulation, gratification or perversion,

which details, descriptions or narrative accounts are written or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes and which are to be distinguished from flat and factual statements of the facts, causes, functions or purposes of the subject of the writing or presentation, such as would be found in bona fide medical or biological textbooks, shall be guilty of a misdemeanor.

For the purposes of this section, "knowingly" shall mean having knowledge of the character and content of any item described in this section, or failure to exercise reasonable inspection which would disclose the character and content of the item.

If any part or provision of this section or its application to any person or circumstances is for any reason adjudged invalid or unconstitutional by a court of competent jurisdiction, such judgment shall be limited in its effect to the facts involved in the controversy in which such judgment shall have been rendered and shall not affect the validity of the remainder of this section or its application to other persons and circumstances; and the legislature hereby declares that it would have enacted this section without the invalid part, provision or application had such invalidity been apparent.

Opinion of Court of Appeals

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KEATING, *Judge.*

In response to the deeply felt needs of the community, our State Legislature enacted two statutes (L.1965, ch. 327, eff. Sept. 1, 1965; L.1965, ch. 372, eff. July 1, 1965) proscribing the dissemination, to infants under 17 and 18 years of age respectively, of materials obscene as to such infants, though not necessarily obscene as to the adult community.

The statutory scheme is no broader than necessary to reach the desired end. The adult community remains free to read what it wishes. Dissemination of material, obscene only as to children, is proscribed only as to children. The unconstitutional infirmity pointed out in Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412, is overcome. The adult population is not restricted to reading only that which is fit for children.

In Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 271 N.Y.S. 2d 947, 218 N.E.2d 668, we upheld the Legislature's power to employ variable concepts of obscenity. The questions not then being presented, we left it for another day to determine whether the statutes, in their application, squared with the mandates of the First and Fourteenth Amendments to the Federal Constitution. The present case poses these questions with regard to the statute effective on July 1, 1965 (Penal Law, Consol Laws, c. 40, § 484-i).

On July 19, 1965, at the instigation of Operation Yorkville, 17-year-old Anthony Sciacovelli approached the appellant's cigar store, examined an outside stand containing "girlie" magazines, selected two and entered the store. Appellant looked at them, priced them at $2.25 and sold

them to Sciacovelli, who thereafter departed. Once outside Sciacovelli wrote his name and the time and place of purchase on an inside cover without further examining the magazines' contents.

Candid is the name of the magazine which appellant sold to Sciacovelli and for the sale of which he was subsequently convicted pursuant to section 484-i of the Penal Law (sale or delivery of pornographic material to minors under the age of 18). *Candid's* cover show's a girl seductively posed beside a couch wearing the skimpiest of undergarments. In addition, the cover describes the contents: "Smut For Women Only", "How To Undress With Class", "Sex With a Twist", "Picadilly Prostitute" and "Should She or Shouldn't She". The lower left-hand corner states: "Sale To Minors Forbidden".

What the cover promises, the contents delivers. *Candid* is devoted purely to sex, told pictorily by nudes in almost every conceivable pose and by tales of sex orgies in picture and prose. The advertisements, in line with the over-all theme, are for mail-order photographs and motion pictures of nudes, lingerie, and sexual devices and handbooks.

We have no difficulty concluding on the basis of the proof offered at the trial, that *Candid* falls within the ban of the statute and that the appellant, with knowledge of its contents, sold the magazine to a person under the age of 18 years.

We turn now to the constitutional questions. Specifically, appellant contends that section 484-i is unconstitutionally vague, in violation of due process of law, and that the statute's failure to require proof of *scienter* as to the age of the purchaser renders it unconstitutional as a limitation on the freedom of speech and the press as guaranteed by the First and Fourteenth Amendments.

Section 484-i divides the material to which it applies into three subdivisions: (1) photographs, drawings and motion pictures depicting specified parts of the body or

acts; (2) a combination of such photographs, drawings or motion pictures "depicted or shown in such a posture or way that the viewer's attention or concentration is primarily focused on * * *" described parts of the body, and (3) books, magazine[s], phonograph record[s] or similar sound reproductions containing details, descriptions or narrative accounts of specified sex acts. The material thus made subject to restriction is defined with precision and clarity.

The "obscenity" standard is virtually the same in all three subdivisions. It must be: "posed or presented in such a manner as to exploit lust for commercial gain and * * * which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes * * *".

Appellant urges that under the statute a conviction may lie based on material which does no more than appeal to the minor's "curiosity as to sex or to the anatomical differences between the sexes". Clearly this is not so. The thrust of the statute is against pandering the obscene to minors. Material which merely appeals to the minor's "curiosity as to sex or to the anatomical differences between the sexes" without more does not fall within the ban of the statute. In addition, as already noted, the material must be "posed or presented in such a manner as to exploit lust for commercial gain". Thus the last-quoted portion appears followed by the conjunctive "and" rather than the disjunctive "or". If this were not the case, we would be presented with a different question entirely (see People v. Bookcase, Inc. 14 N.Y.2d 409, 252 N.Y.S.2d 433, 201 N.E.2d 14). But clearly the statute is not intended to and does not spill over into the area of constitutionally protected matter.

By explicit provision, the obscene is distinguished from "flat and factual statements of the facts, causes, functions

or purposes of the subject of the writing or presentation, such as would be found in bona fide medical or biological textbooks". The *sine qua non* of any prosecution under section 484-i goes to the purpose of the material—"posed or presented in such a manner as to exploit lust for commercial gain"—and this clearly excludes legitimate works of art, educational texts and literature with redeeming social value.

Notwithstanding the concededly imprecise definition of the term "obscene", workable standards are available. "The intrinsic nature, tendency and bent of the work determines whether it is to be banned or its vendor punished" (Chief Judge Desmond concurring in People v. Richmond County News, 9 N.Y.2d 578, 588, 216 N.Y.S.2d 369, 377, 175 N.E.2d 681). Other quotes from the same opinion elaborate the same recurring theme: " 'For a book to be prohibited it is necessary that from its whole tenor the author's intention is evident of teaching the readers about sins of impurity and arousing him to libidinousness' (Noldin, De Preceptis Dei et Ecclesiae, p. 658)." " 'A pornographic book * * * is one deliberately designed to stimulate sex feelings and to act as an aphrodisiac' ([St. John-Stevas,] Obscenity and the Law, p. 2)."

And again in the recent decision by the Supreme Court in Ginzburg v. United States, 383 U.S. 463, 467, 86 S.Ct 942, 945, 16 L.Ed.2d 31: "each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.' Roth v. United States, supra, 354 U.S. [476], at 495-496, 77 S.Ct. 1304, 1314-1315, 1 L.Ed.2d 1498 (Warren, C. J., concurring)."

By proscribing specified materials "posed or presented in such a manner as to exploit lust for commercial gain", the statute gives clear and unequivocal warning of the conduct to be avoided. We perceive nothing vague or

uncertain about the statutory prohibition and thus hold that the statute provides reasonably ascertainable standards of guilt readily determinable by men of reasonable intelligence (see Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066).

The second point urged by appellant presents a question of constitutional law which, although raised, has never before been directly ruled on. (See People v. Kahan, 15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333; People v. Bookcase, Inc., 14 N.Y.2d 409, 418, 252 N.Y.S.2d 433, 440, 201 N.E.2d 14, 19, supra.) It arises from the paradoxical nature of the statute under consideration which, while proscribing certain materials to those under 18, nonetheless affords full First Amendment protection to the same material when considered with relation to those 18 years of age and older. This dichotomy, the appellant contends, requires proof of *scienter* of age as a predicate to a conviction under the statute.

Section 484-i requires *scienter* of obscenity i.e., some knowledge by the bookseller of the character of the book being sold. This is the constitutional mandate of Smith v. People of State of California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205. Its rationale was stated by Mr. Justice Brennan at page 153, 80 S.Ct. at page 219: "By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature • • • And the bookseller's burden would become the public's burden, for by restricting him the public's access to

reading matter would be restricted." (See, also, Mishkin v. State of New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56.) Of course this rule has been followed in New York (People v. Finkelstein, 9 N.Y.2d 342, 214 N.Y.S.2d 363, 172 N.E.2d 470).

The appellant now urges that *scienter* as to age is also a requirement of the Constitution. He contends that a statute which does not in some manner require proof of *scienter* as to the age of the purchaser, as section 484–i does not, is subject to the same unconstitutional infirmities as one not requiring proof of *scienter* as to obscenity. We cannot agree.

There is a substantial difference, we think, between permitting a conviction without proof of *scienter*—i. e., some reason to know of the prohibition which attaches to the banned material—and imposing strict liability for the sale of such material to those under the proscribed age after *scienter* of obscenity exists. The First Amendment does not protect obscenity (Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498) and we deal here, not with material which falls under the umbrella of protection, but with material, the dissemination of which may be controlled by the State.

The appellant's First Amendment argument, we note, seeks no protection for the infant under 18, nor in fact is it directly aimed at his own protection with reference to those in the same age category. His right of dissemination depends on a correlative right in the public to receipt of such material and we have seen that, as to those under 18, no such right exists. The right, if any, belongs to those 18 and over for, as to them, dissemination and receipt are fully protected.

The point urged then is that, absent a requirement of proof of *scienter* as to age, the bookseller will tend to restrict the sale of such materials to those who he can

be sure are over 17 for, so the argument goes, he would rather forego the sale than risk the possibility of conviction. Thus, he says, dissemination to those over 17 will be severely curtailed in violation of the First Amendment.

The contention, we think, lacks merit. It fails to the extent that there is a major difference between requiring the bookseller to read every piece of material which he chooses to sell and requiring him to inquire after and establish the age of those persons who will fall within the doubtful age bracket. Obviously, the number of situations in which such inquiry will be necessary will be quite few. The eye of experience easily perceives the difference between an infant and an adult. Where the area greys, inquiry is required. We have no doubt that the Legislature could affirmatively mandate such inquiry and we see no reason why the same result cannot be attained by indirection.

As the Supreme Court said in Smith v. People of State of California, 361 U.S. 147, 154-155, 80 S.Ct. 215, 219, supra: "Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene". The question then is not one of absolutes—it is one of reasonableness in relation to the legitimate end to be obtained. We think the burden of the statute neither unduly restricts dissemination of protected matter nor unduly inhibits receipt by those who are constitutionally entitled to receipt.

"Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse" (Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 708, 51 S.Ct. 625, 628, 75 L.Ed. 1357; see, also, Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469). Thus, in the final analysis, the answer to the problem must turn on whether the method adopted for coping with a

public evil is kept within the narrowest bounds necessitated by the situation, so as not to impinge on the full measure of guarantees afforded by the First Amendment. We are unable to say that the method adopted by the Legislature, of imposing strict liability on the bookseller for the knowing sale of obscene matter to a minor, infringes upon his constitutional rights or tends to inhibit the free dissemination of literature. That being the case, it is not, of course, for us to determine whether strict liability is the better of two available alternatives. That is a question for the State Legislature. (Compare Penal Law, § 484-i and § 484-h.)

We have examined the appellant's other alleged assignments of error and find them to be without merit.

The judgment appealed from should be affirmed.

FULD, *Judge* (dissenting).

The defendant Tannenbaum was convicted of violating section 484-i of the Penal Law, prohibiting the sale of certain material to children. Since, as I have already indicated (People v. Kahan, 15 N.Y.2d 311, 312, 258 N.Y.S. 2d 391, 392, 206 N.E.2d 333, 334), I have no doubt that the Legislature may constitutionally act to protect youngsters from the sort of objectionable matter contained in the magazine before us (see, also, Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 271 N.Y.S.2d 947, 218 N.E.2d 668), it is with some reluctance that I vote to reverse his conviction. I do not see how, if there is to be compliance with the demands of the Constitution, section 484-i may be upheld. Laudable though the purpose of the section may be, it offends essential guarantees, since it punishes the distribution of constitutionally protected communication. Indeed, it contains the same defects "in respect of its substantive definitions" as led this court in People v. Kahan, 15 N.Y. 2d 311, 312, 258 N.Y.S.2d 391, 392, 206 N.E.2d 333, 334, supra, to invalidate former section 484-h.

Section 484-i proscribes the sale to minors "actually or apparently under the age of eighteen years" of photographs and other representations of certain parts of the human body if such material appeals to the "curiosity" of children "as to sex or to the anatomical differences between the sexes". These criteria, standing by themselves, are patently insufficient and impermissible predicates for penal liability. Quite apart from the fact that the statute would improperly cover both married teenagers and children of tender years (cf. Griswold v. State of Connecticut, 381 U.S. 479, 485-486, 85 S.Ct. 1678, 14 L.Ed. 2d 510), it would indiscriminately punish the dissemination of material that stimulates healthy, as well as morbid, curiosity about sex and sexual differences. Taken literally, the provision would outlaw every course in sex education and feminine hygiene taught in the schools and would bar access by children to reproductions of, for example, the paintings by Michelangelo in the Sistine Chapel as well as the works of other great masters. (See Roth v. United States, 354 U.S. 476, 487, 77 S.Ct. 1304; People v. Bookcase, Inc., 14 N.Y.2d 409, 417-418, 252 N.Y.S.2d 433, 439-440, 201 N.E.2d 14, 18-19.)

It is claimed, however, that the statute is limited in its application by the requirement that the specified material be "presented in such a manner as to exploit lust for commercial gain". Even if this be so, the legislation is still too broad. Although the manner in which a work is sold may have some bearing in determining the question of obscenity "in close cases" (Ginzburg v. United States, 383 U.S. 463, 474, 86 S.Ct. 942, 16 L.Ed.2d 31; see, also, A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Massachusetts, 383 U.S. 413, 420-421, 86 S.Ct. 975, 16 L.Ed.2d 1), the intent of the seller, or his presentation (assuming that the presentation is not itself punishable), does not deprive publications or other works which are not questionable of

their constitutional protection. (See Ginzburg v. United States, 383 U.S. 463, 475-476, 86 S.Ct. 942, supra.) And yet, on its face, section 484-i punishes the sale of non-questionable, constitutionally protected, material. What is more, the language "presented in such a manner as to exploit lust for commercial gain"—upon which the majority now relies to sustain the section's constitutionality—is the exact phrase which this court recently held unconstitutionally vague in the *Kahan case.* (15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333, supra), and it surely has not gained precision by re-enactment. On the contrary, it is clear that the quoted provision does not sufficiently limit the reach of section 484-i and does not enable booksellers and others within its purview to know with any reasonable degree of certainty exactly what material is condemned. In this respect, the statute violates "the first essential of due process of law". (Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322; see, also, Winters v. People of State of New York, 333 U.S. 507, 519-520, 68 S.Ct. 665, 92 L.Ed. 840; People v. Bookcase, Inc., 14 N.Y.2d 409, 415-416, 252 N.Y.S.2d 433, 437-439, 201 N.E.2d 14, 17-18, supra; People v. Firth, 3 N.Y.2d 472, 474-476, 168 N.Y.S.2d 949, 950-952, 146 N.E.2d 682, 683-684.)

It is difficult to understand the place which section 484-i is intended to fill in the legislative scheme. Within a few days after enacting section 484-h—to replace the similarly numbered section which the court ruled invalid in *Kahan* (15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333, supra)—the Legislature adopted present section 484-i dealing with the identical subject, the distribution of objectionable materials to minors. The basic difference between the two pieces of legislation is that the former incorporates a number of safeguards, omitted from section 484-i, designed to prevent unconstitutional application of the law.[1] Among

[1] Since section 484-h is not before us, references to it are for comparative purposes only.

such safeguards are these: (1) the material must "predominantly appeal * * * to the prurient, shameful or morbid interest of minors"; (2) it must be "patently offensive" when judged in accordance with prevailing community standards for minors; and (3) it must be "utterly without redeeming social importance for minors". Section 484-i, on the other hand, does not require proof of any of those items to support prosecution of the vendor.

In a proceeding to punish the dissemination of material to the general public on the ground that it is obscene, the People must of course, prove that the material has a predominant appeal to prurient interest,[2] that it is so patently offensive as to affront current community standards of decency and that it has no redeeming social value. (See A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Com. of Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, supra; Mishkin v. State of New York, 383 U.S. 502, 508-509, 86 S.Ct. 958; Manual Enterprises v. Day, 370 U.S. 478, 482, 82 S.Ct. 1432, 8 L.Ed.2d 639; Roth v. United States, 354 U.S. 476, 489, 77 S.Ct. 1304, supra.)[3] The standards of a law punishing the sale of

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[2] Where the material is designed for and primarily disseminated to a particular deviant sexual group, its prurient appeal is determined "in terms of the sexual interests of its intended and probable recipient group'. (Mishkin v. State of New York, 383 U.S. 502, 509, 86 S.Ct. 958, 963.)

[3] In a prosecution in this State under section 1141 of the Penal Law, the People must also establish that the book or other material in question is "hardcore pornography". (People v. Richmond County News, 9 N.Y.2d 578, 586-587, 216 N.Y.S.2d 369, 375-376, 175 N.E.2d 681, 685-686; People v. Fritch, 13 N.Y.2d 119, 123, 243 N.Y.S.2d 1, 5, 192 N.E.2d 713, 716.) Consequently, as the Supreme Court recently observed in Mishkin v. State of New York, 383 U.S., at pp. 506, 508, 86 S.Ct., at pp. 962, 963, our court, by so construing section 1141, has adopted a more limited definition of "obscenity" than that adopted in the *Roth* case (354 U.S. 476, 77 S.Ct. 1304, supra).

obscene or objectionable matter to youngsters need not be so stringent. This is so not because children may be denied the constitutional right of access to communication but, rather, because children may, in the exercise of that right, be beset by dangers that do not affect adults or, if they do, not to the same degree. (See Censorship by Age Classification, 69 Yale L.J. 141, 147-148.) The responsibility and authority of the State are for that reason greater and its powers more extensive when it legislates for the protection of children. (See Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 271 N.Y.S.2d 947, 218 N.E.2d 668, supra; Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 168, 64 S. Ct. 438, 88 L.Ed. 645.)[4] Be that as it may, however, it is essential that such legislation be clearly drawn and "restricted to the evil with which it is said to deal." (Butler v. State of Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 526; see, also, Winters v. People of State of New York, 333 U.S. 507, 509 et seq., 68 S.Ct. 665, supra.) When a State statute affecting the constitutional right of free speech is broader in its application than necessary to effect its purpose, as is section 484-i, it violates the First and Fourteenth Amendments of the Federal Constitution. (See Ashton v. Kentucky, 384 U.S. 195, 200-201, 86 S.Ct. 1407, 16 L.Ed.2d 469; Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524, supra; see, also, People v. Richmond County News, 9 N.Y.2d 578, 584, 586, 216 N.Y.S.2d 369, 373, 375, 175 N.E.2d 681, 684, 685.)

Section 484-h of the Penal Law—the statute to which I have previously referred—also requires, as an additional prerequisite to prosecution, that the defendant bookseller knew or had "reason to know" that his customer was under age. The statute provides that an honest mistake in this regard is a complete defense, provided the seller made a

[4] While the supervision of children's reading is best left to their parents, the knowledge that such parental control or guidance cannot always be provided justifies broader regulation in this area.

reasonable and bona fide attempt to ascertain the buyer's age. Section 484–i, on the other hand, completely ignores this requirement of *scienter* as to age, an element which, I note, three of the four judges comprising the majority in the *Kahan* case (15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333, supra) explicitly declared to be indispensable in such a statute.[5] I have come on no other case which considered this precise issue but, in Smith v. People of State of California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, the Supreme Court held that a conviction for selling obscene literature could not be sustained unless there was some requirement as to *scienter* on the part of the seller with respect to the contents of the books involved. The court reasoned that, "if the bookseller is criminally liable without knowledge of the contents * * *, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature" (361 U.S., at p. 153; 80 S.Ct., at p. 218). This rationale would seem to be equally applicable to *scienter* as to age when the youth of the buyer is an element of the crime. Absolute liability without regard to whether the bookseller was put on notice that his customer was under age would necessarily restrict and curtail the distribution of literature to adults, particularly women, whose youthful appearance belied mature years. In its efforts to protect children, the State is not privileged to so hinder the flow of information and ideas.

The People would have us analogize the sale of books to the sale of liquor for which, it is settled, there is strict accountability. (Alcoholic Beverage Control Law, § 65, subd. 1; see People v. Werner, 174 N.Y. 132, 134, 66 N.E.

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[5] As the fourth judge, I found it "unnecessary" to consider the question in view of the other and more basic reasons assigned by the court for holding the statute under review—old section 484-h—unconstitutional (15 N.Y.2d 311, 314, 258 N.Y.S.2d 391, 393-394, 206 N.E.2d 333, 335).

667, 668.) The analogy is, however, imperfect and cannot stand analysis. Unlike traffic in liquor which is a privilege that the State may limit or even withdraw at any time (U.S.Const. 21st Amdt.), traffic in books—with its coextensive guarantee of freedom of expression—is a constitutionally protected right. As the Supreme Court put it in the *Smith* case (361 U.S. 147, 152-153, 80 S. Ct. 215, 218, supra), "There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller."

Finally, the argument is advanced that, if *scienter* as to age is a constitutional imperative, then, this court should read that element into the statute instead of invalidating it. (See People v. Finkelstein, 9 N.Y.2d 342, 214 N.Y.S.2d 363, 174 N.E.2d 470.) But the language of section 484–i is manifestly too explicit and specific to permit such a construction. The People acknowledge that, in the clause "knowingly sells * * * to a person *actually or apparently* under * * * eighteen", the word "apparently" is confusing and nonsensical. It is, however, noteworthy that the exact same verbiage was used by the Legislature in prohibiting the sale of liquor to children (Alcoholic Beverage Control Law, § 65, subd. 1) and, since that wording has consistently been interpreted to impose strict criminal liability (see, e. g., People v. Werner, 174 N.Y. 132, 134, 66 N.E. 667, 668, supra; Matter of Barnett v. O'Connell, 279 App. Div. 449, 111 N.Y.S.2d 166), there can be no doubt —as, indeed, the majority so holds—that a similar meaning was intended for section 484–i.[6]

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[6] In any event, even if the statute could possibly be interpreted to require proof of *scienter* as to age, a reversal is compelled in the present case since the trial court did not so read the statute. (See People v. Finkelstein, 9 N.Y.2d 342, 214 N.Y.S.2d 363, 174 N.E.2d 470, supra; Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91-92, 86 S.Ct. 211, 15 L.Ed.2d 176).

In short, I think it clear that section 484–i, by virtue of its confusing text and its exclusion of constitutionally mandated criteria, infringes First Amendment rights and the demands of due process. (See People v. Kahan, 15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333, supra; see, also, Note, 34 Fordham L.Rev. 692, 705–707.) The defendant's conviction should be reversed and the information dismissed.

BERGAN, Judge (concurring for reversal).

In People v. Kahan, 15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333, this court held section 484–h of the Penal Law, as it then read, was constitutionally deficient and at the same time suggested careful draftsmanship could provide a constitutionally valid statute for the protection of young persons against obscene publications.

With the aid of District Attorneys and other specialists, a constitutionally sound statute was enacted by the Legislature by a new section 484–h (L. 1965, ch. 327) which meets the test laid down in *Kahan* and in the Federal cases. At the same session of the Legislature, for some reason not made clear, section 484–i was also enacted (L. 1965, ch. 372) which, as Judge FULD demonstrates, was so drafted as to be open to constitutional defects in important respects similar to those considered in *Kahan*. If due respect is to be paid to the prior decisions of this court, it must be held that section 484–i is defective in draftsmanship.

On pragmatic grounds if there is open to the prosecution a choice between a soundly conceived statute and a defective statute, the prosecution should rest on the strong law rather than the weak one. To insist on prosecution under section 484–i, with its patent defects in draftsmanship, unnecessarily opens up a potentiol field of litigation in the Federal courts with the ultimate decision on constitutionality, and hence the enforcement of this statute to protect the young, left in doubt.

This can be avoided if, consistent with *Kahan*, the section 484–i enactment is now held unconstitutional. This would, in turn, require prosections to be made in pursuance of the soundly drafted provision of section 484–h. I concur, also, in the views expressed by Judge Fuld.

All concur except FULD, J., who dissents in an opinion in which VAN VOORHIS and BERGAN, JJ., concur. BERGAN, J., dissenting in a separate opinion in which VAN VOORHIS, J., also concurs.

Judgment affirmed.

Order and Judgment of Affirmance

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of September in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

REMITTITUR

September 29, 1966.

App. T. No. 163. 66

THE PEOPLE &c.,

Respondent,

vs.

CHARLES TANNENBAUM,

Appellant.

BE IT REMEMBERED, That on the 8th day of April in the year of our Lord one thousand nine hundred and sixty-six, Charles Tannenbaum, the appellant in this cause, came here unto the Court of Appeals, by Osmond K. Fraenkel, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Term of the Supreme Court, First Judicial Department.

Order and Judgment of Affirmance

And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Osmond K. Fraenkel, of counsel for the appellant, and by Mr. John A. K. Bradley, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

Clerk's Certificate to foregoing paper (omitted in printing).

(Submitted upon consent of the parties)

FEB 1 1967
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 993

CHARLES TANNENBAUM,

Appellant,

against

STATE OF NEW YORK,

Respondent.

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT AND UPON THE MERITS

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Of Counsel.

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Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc. of 1 Park Avenue, New York, N. Y. is a membership corporation composed of most of the leading publishers of books of general circulation, including many university presses. It is estimated that the 192 members of the Council publish and distribute over 85% of all general books published in the United States. Neither Appellant nor the publisher of the work in question is a member of the Council.

The Council is deeply interested in safeguarding freedom of the press as guaranteed by the First and Fourteenth Amendments to the Federal Constitution. It

sought leave to and did obtain consent of the parties to file this brief, because it believes that Section 484-i of the New York Penal Law is unconstitutional. The Council as a matter of policy takes no position with respect to the obscenity *vel non* of any publication and, therefore, this brief will not address itself to the magazine here involved.

ARGUMENT

POINT I

Section 484-i of the New York Penal Law is unconstitutionally vague.

The statute here in question, Section 484-i of the New York Penal Law, is one of two New York statutes dealing with virtually the same problem—the sale of pornographic material to minors. The wording of the other statute, Section 484-h of the New York Penal Law, is obviously intended to relate to criteria set forth in several decisions of this Court on obscenity, although these criteria have been modified and weakened in order to apply to sales to minors rather than to adults. (See sub-section 484-h.1(f) of the statute, reprinted at pp. 13-14, Jurisdictional Statement.)

In contrast to Section 484-h, Section 484-i (p. 15, Jurisdictional Statement) applies to material which is "posed or presented in such a manner as to exploit lust for commercial gain" (Sub-sections 1 and 2; the phrase "written or presented" rather than "posed or presented" is used in Sub-section 3). Not only does a reading of the statute indicate that this quoted phrase is its operative criterion, but in its opinion sustaining the constitutionality

of this statute, the New York Court of Appeals emphasized that the *sine qua non* of any prosecution under the statute was proof that the material was "posed or presented in such a manner as to exploit lust for commercial gain".

We submit that under any circumstances the operative phrase of Section 484-i is so vague as to render the statute unconstitutional. However, the opaqueness of this language is immeasurably compounded when contrasted with the words of its companion statute Section 484-h. Section 484-i undoubtedly covers situations where a prosecutor would not be able to prove a strong enough case to obtain a conviction under Section 484-h. But precisely what situations the legislature had in mind is unclear. As Chief Judge Fuld stated in his dissent herein: "It is difficult to understand the place which Section 484-i is intended to fill in the legislative scheme".

Further complicating the interpretation of this statute is the use of an operative criterion involving commercial intent. This Court has recently stated that commercial intent cannot be a criterion for judging whether or not a particular defendant is guilty of publishing obscenity; *Ginzburg* v. *United States,* 383 U. S. 463 (1966):

> "* * * No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."

In another context this Court has very recently reiterated that the presence or absence of commercial motive

cannot affect the rights of a particular publication; *Time* v. *Hill,* U. S. (No. 22, October Term 1966, decided January 9, 1967).

> "The requirement that the jury also find that the article was published 'for trade purposes,' as defined in the charge, cannot save the charge from constitutional infirmity. 'That books, newspapers and magazines are pubilshed and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.' Joseph Burstyn, Inc. *v.* Wilson, 343 U. S. 495, 501; see New York Times Co. *v.* Sullivan, 376 U. S., at 266; Smith *v.* California, 361 U. S. 147, 150; cf. Ex parte Jackson, 96 U. S. 727, 733; Grosjean *v.* American Press Co., 297 U. S. 233; Lovell *v.* Griffin, 303 U. S. 444."

Yet Section 484-i makes the constitutionally prohibited factor of commercial intent its sole operative criterion.

As a result of all of this, the meaning of Section 484-i is incomprehensible. Accordingly the statute should be declared unconstitutionally vague.

POINT II

The statute is unconstitutional because it contains no requirement of knowledge on the part of the defendant as to the age of the purchaser.

Once again in contrast to Section 484-h, Section 484-i imposes absolute liability upon anyone selling a prohibited publication to anyone "actually or apparently under the age of 18 years". It is not a defense that the defendant in good faith believed that the purchaser was over the age of 18 years. Indeed, the statute as worded would

impose a criminal liability on a defendant who sold a publication to a minor in reliance upon a fraudulent or forged document indicating that the purchaser was over 18.

Moreover, the wording in this regard is also vague since it prohibits sales to a person "apparently under the age of eighteen years". Whether or not this makes a person liable for sales to persons who appear to be under eighteen, when they are in fact over eighteen, is unclear.

As Chief Judge Fuld pointed out in his dissent in the New York Court of Appeals, the net effect of such absolute liability must be to hinder the flow of information and ideas to adults as well as minors.

CONCLUSION

For the reasons above stated, we urge this Court to hold Section 484-i of the New York Penal Law unconstitutional.

Respectfully submitted,

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FILED
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IN THE

Supreme Court of the United States

October Term, 1966

No. 993

CHARLES TANNENBAUM,

Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1966

No. 993

CHARLES TANNENBAUM,

Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee in the above entitled case moves to dismiss or affirm on the grounds that the question presented is wholly insubstantial.

As the appellant's jurisdictional statement poses it, the only question presented concerns the constitutionality of New York Penal Law Section 484(i), upheld by a divided Court of Appeals [18 N.Y.2d 268; Appendix to Jurisd. Stmt.]. That question is now utterly without importance or significance because the provision in question is a dead letter. On September 1, 1967, the entire Penal Law of New York will go out of existence, repealed by a revised Penal Law which takes effect on that date.

Section 484(i), repealed with the rest, has not been perpetuated in the new law. And the Legislature of the State of New York has now concluded its session. The subject matter of Section 484(i), the sale and distribution to minors of salacious materials, has been treated in the revised Penal Law in a manner altogether different from the provision questioned by the instant appeal. By a Bill (S. 4412) passed by both houses of the New York Legislature on April 1, 1967, the revised Penal Law was corrected in a number of particulars. Among these was the repeal of prospective Section 235.20, which was a recodification of an earlier provision declared unconstitutional by the New York Court of Appeals in *People* v. *Bookcase*, —— N.Y.2d —— ( ) [see also, *People* v. *Kahan*, 15 N.Y.2d 311 (1965)]. Substituted therefor in the new Penal Law is a re-enactment of the existing 484(h) of the present Penal Law. The New York Court of Appeals, in their opinion in the instant case, noted with mystification the dual provisions in New York law on the same subject, and while the majority upheld §484(i), the entire court appeared to favor the formulation of §484(h).

Accordingly, prosecutions since the *Tannenbaum* decision have been brought, in most instances, under the constitutionally stronger §484(h) and, any new cases initiated before September 1, 1967, are likely to be under §484(h). Section 484(i) will therefore lie dormant, indeed moribund, until its total demise in the very near future.

Under these circumstances, the instant case hardly presents a question of sufficient importance for this Court to hear or determine; it has no importance for New York, and

because of the peculiar framing of the statute, little if any importance for other jurisdictions. For Mr. Tannenbaum, who was sentenced to 30 days and a fine of $100, the case is of minor importance; the fine has been paid and the jail term was suspended.

WHEREFORE, it is respectfully prayed that the appeal be dismissed or the judgment summarily affirmed.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
Assistant District Attorney
Of Counsel

Dated: New York, N. Y.
April, 1967

SUPREME COURT, U. S.

APR 20 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1966

No. 993

CHARLES TANNENBAUM,

Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM OR DISMISS

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Supreme Court of the United States

October Term, 1966

No. 993

CHARLES TANNENBAUM,

Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM OR DISMISS

Appellee has moved to dismiss or affirm on the ground that the question in respect to the constitutionality of Penal Law Section 484-i is unsubstantial. This argument does not in any way deal with the merits of appellant's claim, but rests solely on the circumstance that after September 1, 1967 this section will have expired by reason of the enactment of a new Penal Law by the New York legislature.

It is, of course, a matter of pure speculation as to whether or not there will be further prosecutions under § 484-i between now and September 1st. On the other hand, to present counsel's personal knowledge, there has been one prosecution resulting in a judgment of conviction under this section which is now on appeal in the courts of the State of New York. That is the case of *People of the State of New York* v. *David Rabeck,* instituted in the Criminal Court of the City of New York, for the County of the Bronx, under Docket No. B 10352. This resulted in a conviction and a sentence of six months imprisonment, which sentence was, however, suspended. An appeal was taken on February 7, 1967 to the Appellate Term of the Supreme Court of the

State of New York, for the First Judicial Department, and has been noticed for the May session of that Court.

There are thus two convictions under this statute which hang over the heads of the two individuals, and although the convictions are for misdemeanors the fact of such convictions will remain on record and can result in hardship to the individuals in connection with attempts to seek employment and other matters.

There is also here the question of a $100 fine which, if our view of the matter is correct, should be refunded. This Court has held that cases are not moot if costs are involved and surely a fine is at least of the same character: see *Wetzel* v. *Ohio*, 371 U.S. 62.

In addition, there is in this case the question of scienter which is discussed on pages 11 and 12 of the Jurisdictional Statement. The issue in this respect is similar to that in *Redrup* v. *New York*, No. 3 on this Court's docket, which was argued on October 10, 1966 and has not yet been decided.

For all these reasons, I respectfully submit that the motion to dismiss or affirm should be denied and probable jurisdiction noted so that the case can be argued on its merits.

Respectfully submitted,

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Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

TANNENBAUM *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 993. Decided June 12, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed as moot.

MR. JUSTICE BRENNAN would reverse the judgment of the lower court.

MR. CHIEF JUSTICE WARREN, dissenting.

I dissent from the dismissal of this appeal as moot for the reasons stated in my dissent in No. 660, 1966 Term. In my view, the question presented by this case is extremely important and requires a decision on the merits by this Court. I would note probable jurisdiction and set the case for argument.

MR. JUSTICE DOUGLAS dissents. (See dissent set forth in No. 660.)